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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ORIS CHARLES TURNER, Defendant and Appellant.	B205761 (Los Angeles County Super. Ct. No. BA304245)

APPEAL from a judgment of the Superior Court of Los Angeles County, Luis A. Lavin, Judge. Affirmed in part, reversed in part, and remanded.

Marcia R. Clark, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Yun K. Lee and Eric E. Reynolds, Deputy Attorneys General, for Plaintiff and Respondent.

Oris Charles Turner appeals from his conviction of three counts of attempted robbery (Pen. Code, §§ 664/211)[1] and one count of assault with a firearm on a police officer (§ 245, subd. (d)(1)). He contends the evidence is insufficient to support his conviction for one of the attempted robbery counts. He also contends the conviction for assault with a firearm on a police officer must be reversed because he withdrew from the criminal activity before his accomplice fired at the officer.

We conclude there is insufficient evidence to support one of the attempted robbery counts, and reverse appellant's conviction as to that count. In all other respects, the judgment is affirmed.

FACTUAL AND PROCEDURAL SUMMARY

On June 11, 2006, between midnight and 1:00 a.m., appellant, Steven Trotter (appellant's cousin), Michael Wilson, and two other individuals (Wilson's cousin and younger brother) left a party together in a car driven by Wilson's cousin. After the men failed to find another party to attend, Trotter stated that he wanted to commit a robbery. Though Trotter's companions disagreed with this proposal, he was insistent and showed them that he had a gun. A Subway sandwich shop (Subway) was selected as the target.

Wilson entered Subway first, around 1:30 a.m. At that time, there were three employees on duty: manager Julio Garcia, Juan Gonzalez, and Mario Morales. Morales was washing dishes in a back room; Garcia and Gonzalez were working in the front of the restaurant. Wilson asked Garcia for an employment application and took a seat by the front window.

Approximately 10 or 15 minutes later, appellant and Trotter entered Subway. After appellant ordered cookies, Trotter brandished a gun and said, "This is a robbery, open the register." Garcia ran into the back of the restaurant to try to reach an alarm, but was followed by appellant. Before Garcia could reach the alarm, appellant grabbed him, punched him in the nose, and forced him back to the front of the restaurant.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Meanwhile, California Highway Patrol Officers Daniel Max and Armando Gaona stopped at Subway to pick up food before beginning their 2:00 a.m. shift. The officers were in uniform and rode in a marked highway patrol vehicle. While Officer Gaona waited in the car, Officer Max approached Subway. He heard someone say, in a loud whisper, "The cops, the cops." The whisper seemed to come from a person, later identified as Wilson, standing partially outside Subway's door, leaning in. When Officer Max looked inside the restaurant, he saw Trotter wave a gun in Gonzalez's face, then appear to hide the gun behind his back. Trotter turned and walked toward Officer Max. The officer believed Trotter still had a gun hidden behind his back, so he reached for his pistol and motioned for Trotter to get down on the ground. Instead, Trotter produced the gun. Officer Max saw a muzzle flash, and the Subway window shattered.

Apparently, appellant and Garcia returned to the front of the restaurant between the time Officer Max saw Trotter and the time Trotter turned to walk toward Officer Max. Trotter still had his gun pointed at Gonzalez when Garcia was forced back to the counter. Garcia opened the cash register and pulled out the money tray. As he placed the tray on the counter, he heard "a big noise." Upon hearing the noise, appellant and Garcia ran toward the back. Appellant asked Garcia where the exit was. Garcia opened the back door for him, and he fled. After appellant left, Garcia discovered Morales had been hiding in a hole under the sink in the back room. Morales asked what happened. Garcia told him he thought Gonzalez had been shot. Actually, Gonzalez had dropped to the ground when Trotter turned to face Officer Max.

As Trotter fled from the front of the restaurant, Officer Max fired multiple rounds at him. Officer Gaona also attempted to fire at Trotter, but his weapon misfired. Both officers lost sight of Trotter. Soon after, Trotter's body was discovered in a parking lot.

Wilson was standing by Subway's doorway when the first shot was fired. He heard more shots, ran to the car where his cousin and brother were waiting, and they drove away.

Officers responding to the scene saw a man matching appellant's description walk briskly out of the alleyway behind the restaurant. They ordered him to stop, but he began

running, and they lost sight of him. Appellant and Wilson were each arrested later the same day.

Appellant and Wilson were charged with attempted murder of a police officer (count 1), attempted robbery of Garcia (count 2), attempted robbery of Gonzalez (count 3), and attempted robbery of Morales (count 4). (§§ 664, subds. (e) & (f)/187, subd. (a), 664/211.) An enhancement for a principal armed with a firearm was charged in connection with each count. (§ 12022, subd. (a)(1).) The information also alleged that appellant had a prior juvenile adjudication for a serious or violent felony. (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d).) Appellant pled not guilty on all counts.

Appellant and Wilson were tried jointly. The jury deadlocked as to all counts for Wilson. Appellant was found not guilty of attempted murder of a police officer, but was found guilty of the lesser included offense of assault with a firearm on a police officer. He was found guilty of all three counts of attempted robbery. The jury also found the firearm allegation to be true on all counts. In a bifurcated proceeding, the trial court found the prior juvenile adjudication allegation to be true, however the prosecutor conceded it could not be considered a strike for the purposes of sections 667, subdivisions (b)–(i), and 1170.12, subdivisions (a)–(d).

The trial court imposed the upper term of eight years as to count one and consecutive terms of eight months each for counts two through four. The court exercised its discretion to strike the firearm enhancement.

Appellant timely appeals from the judgment of conviction.

DISCUSSION

I

Appellant contends there is insufficient evidence to support his conviction for count four, attempted robbery of Mario Morales. We agree.

A challenge to the sufficiency of the evidence requires us to "'review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable

doubt.'" (*People v. Abilez* (2007) 41 Cal.4th 472, 504.) "'[E]vidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction.'" (*People v. Tripp* (2007) 151 Cal.App.4th 951, 955-956.) Yet, "[w]here the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal." (*People v. Zamudio* (2008) 43 Cal.4th 327, 358.)

"The elements of robbery are: (1) a taking (2) of personal property (3) in the possession of another (4) from [his or] her person or immediate presence (5) against [his or] her will (6) accomplished by means of force or fear (7) with an intent to permanently deprive." (*People v. Prieto* (1993) 15 Cal.App.4th 210, 213, fn. omitted.) Appellant argues there is no substantial evidence that the attempted robbery involved a taking from Morales's person or immediate presence or that force or fear was used against Morales. Because we agree that the immediate presence element was not supported by substantial evidence, we need not address the element of force or fear.

"'The generally accepted definition of immediate presence . . . is that "'[a] thing is in the [immediate] presence of a person, in respect to robbery, which is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it.'"' . . . 'The zone of immediate presence [for purposes of robbery] includes the area "within which the victim could reasonably be expected to exercise some physical control over his property."'" (*People v. Abilez, supra,* 41 Cal.4th at p. 507.)

Morales did not testify at trial. The only evidence regarding Morales came from Garcia's testimony. Garcia testified he had instructed Morales to wash dishes in the back room before the robbery commenced. The prosecutor asked where Morales was at the time appellant left through the back door, and Garcia answered, "Mario [Morales] was hiding into [*sic*] the sink. Because we have a sink to wash dishes, we have a little hole right there. He just go inside." The prosecutor then asked what happened after appellant left, and Garcia testified, "Mario, Mario was kind of panic, panic too, and he asked me

what happened. I said, 'I don't know. I guess the guy killed Juan [Gonzalez].' And we just stopped—we didn't want to move."

Appellant does not challenge the jury's implicit finding that Morales, as an employee of Subway, had constructive possession of Subway's property, along with Gonzalez and Garcia. (See *People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 521 ["'[B]usiness employees—whatever their function—have sufficient representative capacity to their employer so as to be in possession of property stolen from the business owner.' [Citation.] It is not necessary that an employee have specific responsibility for handling cash in order to be a robbery victim. . . . More than one employee may be in constructive possession of the store's property at the same time."].) But appellant argues that the limited testimony regarding Morales does not support a finding that he could have been expected to exercise some control over the money in the cash register, were he not prevented from doing so by fear.

After the robbery attempt, Morales asked Garcia what happened, indicating he did not already know what was taking place in the front of the restaurant. No evidence was presented that Morales saw or heard any of the perpetrators. Respondent asserts that evidence of Morales's hiding in a hole by the sink demonstrates he was prevented by force or fear from retaining possession of Subway's property. But no evidence was presented to establish when Morales hid or why he hid. If Morales hid after hearing a loud noise, such as a gunshot, but had no idea a robbery was occurring, the trier of fact could not reasonably have inferred that he would have exercised control over Subway's property but for his fear. The immediate presence element of robbery must be different in some way from the force or fear element, or it is meaningless. While Garcia's testimony that Morales hid may be substantial evidence of fear, without more it is not enough to support a finding of immediate presence.

This is not to say that the elements of robbery cannot be satisfied unless the victim knows he or she is being robbed. Ample case law shows that the immediate presence element may be satisfied even when a victim is unaware that property is being taken. These cases generally fall into one of two categories. In one, the immediate presence

element is satisfied by contact between the defendant and the victim before the actual taking, and the victim's lack of awareness of the taking is the result of the defendant's use of force or fear. (See, e.g., *People v. Abilez*, *supra*, 41 Cal.4th at p. 507 [defendant killed victim in her home immediately before taking her property]; *People v. Hays* (1983) 147 Cal.App.3d 534, 541-542 [defendant crashed through office ceiling with rifle, causing victim to flee before taking occurred].) In the other category, the immediate presence element is satisfied by contact between the defendant and the victim immediately after the taking, when the defendant uses force or fear to retain stolen property. (See, e.g., *People v. Gomez* (2008) 43 Cal.4th 249, 253-254 [victim arrived at scene after taking occurred, but as he followed defendant, defendant shot at him]; *People v. Jackson* (2005) 128 Cal.App.4th 1326 [victim struggled with defendant after finding him hiding in a closet, but did not notice watch had been taken until after defendant was gone]; *People v. Estes* (1983) 147 Cal.App.3d 23, 27 [victim threatened with knife when he approached defendant who had left a store with stolen merchandise].) In all of these scenarios, the victim could have been expected to exercise control over his or her property had he or she not been incapacitated by force or fear before the taking or during the asportation of the stolen property. Not so in this case, since there is no substantial evidence that Morales was even aware the would-be robbers were present until after they had fled.

Respondent relies on *People v. Douglas* (1995) 36 Cal.App.4th 1681for the proposition that the immediate presence element may be satisfied despite a substantial distance between the perpetrator and victim, but the facts of *Douglas* are not analogous to the present case. The defendant in *Douglas* challenged his conviction of attempted robbery of a particular patron in a bar. (*Id*. at p. 1690.) The victim had been standing at a pool table about 30 feet away from the bar where the defendant held a gun to the bartender. (*Id*. at p. 1685.) The victim, who hid behind the pool table after the defendant brandished a gun, stated he had left cash on the bar, but did not go over to the bar to protect his cash because he could see the defendant had a gun. (*Ibid*.) Thus, unlike the present case, the finding of "'immediate presence'" in *Douglas* was supported by

evidence that the victim saw the armed robber and was prevented by fear from protecting his property. (*Id*. at p. 1691.)

We conclude there is no substantial evidence that Morales could reasonably have been expected to exercise physical control over the money in the cash register if he had not been prevented by fear from doing so. Thus, the immediate presence element of robbery is not satisfied as to count four, and the conviction of attempted robbery of Morales must be reversed.

II

Appellant next argues that he should not have been convicted of assault with a firearm on a police officer because he had withdrawn from the criminal activity before the shooting took place.

Appellant was prosecuted for the assault on Officer Max under the theory that the shooting was a natural and foreseeable consequence of the attempted robbery which he aided and abetted. "Under California law, a person who aids and abets the commission of a crime is a 'principal' in the crime, and thus shares the guilt of the actual perpetrator. (§ 31.) [¶] Accomplice liability is 'derivative,' that is, it results from an act by the perpetrator to which the accomplice contributed." (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.) A person encouraging or facilitating the commission of a crime may be held criminally liable not only for that crime, but for any other offense that is a "'natural and probable consequence'" of the crime aided and abetted. (*Id*. at p. 260.) "[W]hen a particular aiding and abetting case triggers application of the 'natural and probable consequences' doctrine . . . the trier of fact must find that . . . the defendant's confederate committed an offense *other than* the target crime; and . . . the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." (*Id*. at p. 262, fn. omitted.) Assault or murder may be a natural and probable consequence of the target crime of robbery. (See, e.g., *People v. Nguyen* (1993) 21 Cal.App.4th 518, 530; *People v. Rogers* (1985) 172 Cal.App.3d 502, 515.)

An aider and abetter may escape liability for a derivative crime, even though it is a natural and probable consequence of the target crime, if he or she effectively withdraws from participation before the commission of the derivative crime. (*People v. Fiu* (2008) 165 Cal.App.4th 360, 384.) A withdrawal defense requires the defendant to produce evidence "that he both notified the other principals of his intent to withdraw and that he did everything in his power to prevent the commission of the crime." (*Id*. at p. 383.) "Once a defendant has met that burden of production, the prosecution bears the burden of proving beyond a reasonable doubt that the defendant did not effectively withdraw." (*Id*. at p. 384, fn. omitted.)

The trial court instructed the jury on withdrawal, including the prosecution's burden of proof. From this, we infer the trial court found appellant had met his initial burden of production. (See *People v. Fiu*, *supra*, 165 Cal.App.4th at p. 383.) But implicit in the jury's verdict is a finding that the prosecution proved beyond a reasonable doubt that appellant did not notify the other principals of his intent to withdraw, or did not do everything in his power to prevent the commission of the crime, or both. Although not identified as such, appellant's argument regarding withdrawal is essentially a challenge to the sufficiency of the evidence to support this finding. As explained above, a challenge to the sufficiency of the evidence requires us to review the record in the light most favorable to the prosecution to determine whether the jury's finding is supported by substantial evidence. (*People v. Abilez*, *supra*, 41 Cal.4th at p. 504.)

Appellant concedes he did not notify Trotter of his intent to withdraw, nor did he try to prevent Trotter from shooting at Officer Max. This alone is substantial evidence to support the jury's implied finding that appellant did not withdraw from the criminal activity before the assault on the officer took place. Appellant argues that "[t]he circumstances did not permit him to formally advise Trotter or physically prevent him from firing at the officer without risking his own life. Thus, he had no choice but to do exactly what he did: run." Appellant cites no authority for the proposition that merely running away from the scene of the crime when law enforcement arrives constitutes withdrawal. The absence of such a rule is unsurprising, given the policy implications of

allowing flight from law enforcement to absolve a defendant of responsibility for any further crimes committed by his or her accomplices.

The jury's implied finding that appellant did not withdraw from the criminal activity before Trotter shot at Officer Max is supported by substantial evidence.

DISPOSITION

The conviction of count four, the attempted robbery of Mario Morales, is reversed, and the case is remanded to the trial court for resentencing. In all other respects, the judgment is affirmed.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.